UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/440/Add.1
14 June 1991

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-third session
Geneva, 29 April - 19 July 1991

THIRD REPORT ON STATE RESPONSIBILITY

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Addendum

CONTENTS

		Paragraphs	Page
Chapter IX.	The Problem of Differently Injured States ..	89 - 95	2
Chapter X.	Substantive Limitations Issues	96 - 122	8
	A. The Prohibition of Force	97 - 102	8
	B. Respect for Human Rights and Other Humanitarian Values	103 - 113	16
	C. Inviolability of Specially Protected Persons	114 - 117	21
	D. The Relevance of *Jus Cogens* and *Erga Omnes* Obligations	118 - 122	24

GE.91-61267/3258B

Chapter IX.

The Problem of Differently Injured States

89. A further problem is the exact identification of the State or States which, according to the case, are entitled - or in given instances obliged - to react to an internationally wrongful act. The starting point of any thought on the matter is obviously - together with the perception of the essentially inorganic nature of the legal relationships normally arising from internationally wrongful acts - the concept of injured State. A definition of injured State has in fact been envisaged as an essential element of Part Two of the project. We refer to Article 5 as proposed in 1984 and adopted on first reading by the Commission in 1985. 162/ But whatever the merits of that definition - doubts about the full suitability of which have been formulated within the Commission and outside - it seems obvious that differences of degree of involvement surely exist amongst injured States, as defined or definable in general terms, from the viewpoint of the quality and dimension of the suffered injury.

90. A number of qualifications are thus being developed, by scholars and in the Commission, within the general "injured State" notion or class. At the two extremes, one finds terms such as "directly" injured, affected or involved State or States, or "specially" affected State or States, and - opposed to these - "non-directly" or "indirectly" injured or affected or involved States, or "non-specially" affected or injured States. Between the two extremes, one finds concepts such as "more" or "less directly" affected or involved States. Another concept used, is that of "third" State or States. Considering however that a State can be in a "third party" position either in relation to a primary obligation or in relation to a given breach (secondary obligation), the term "third" may be misleading. In the latter sense it would be just a synonym of non-injured State, obviously in the position of "third" party in relation to the wrongful act, meeting as such none of the conditions of the definition embodied, for example, in draft Article 5 of Part Two. The problem, however, - taking for the time being that definition as a starting point - seems to be not so much to determine whether or not a State belongs to the general class of injured States, as to take account of the fact that that general class includes different categories of States from the point of view of the injury, and to determine what consequences may derive therefrom from the point of view of each State's position with regard to its rights, facultés and possibly duties.

91. The attention of the doctrine has been called to this problem - especially since the adoption of Article 19 of Part One - in connection with the wrongful acts consisting in violations of erga omnes obligations, more particularly with regard to the consequences of crimes. The problem related notably to the possible reactions (against wrongful acts of such a kind) on the part of States other than the State which, as a victim of a gross violation, was the "directly" or "most directly" affected: - the said States acting, jointly or separately, possibly within the framework of an

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162/ YBILC, 1985, Vol. II, (Part Two), p. 25.

institutionalized régime. 163/ It did not take long, however, for scholars and the Commission members to realize that similar problems arise in connection with any other wrongful acts - notably delicts - legally involving, in addition to the wrongdoer and one or more directly affected States, other States. 164/ Frequently considered among these situations have been, so far: - the violation of rules of multilateral treaties or of certain kinds of rules contained in such treaties, notably the rules creating so-called non-bilateralizable, or integral rights and obligations (peace treaties, disarmament treaties, treaties on the environment); 165/ - non-compliance with decisions of international judicial bodies; 166/ - non-compliance, not

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163/ This was indeed the main problem dealt with by Riphagen in the context of what our distinguished predecessor called the "third parameter", that is "the position of third States in respect of the wrongful act" (Preliminary Report, YBILC, 1980, Vol. II, (Part One), paras. 62 ff., especially 66 ff., pp. 120-129). On the facultés, rights and duties of States "non-directly" affected by a crime, see, inter alios, P.M. Dupuy, "Action publique et crime international de l'Etat. A propos de l'article 19 du projet de la CDI sur la responsabilité des Etats", in AFDI, Vol. 25, 1979, p. 554, and "Le fait générateur de la responsabilité international des Etats", in Hague Rec., Vol. 188, 1984-V, p. 102; E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures, Dobbs Ferry, New York, 1984, p. 115; D. Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in M. Spinedi, B. Simma, eds., United Nations Codification of State Responsibility, New York, London, Rome, 1987, pp. 198 ff.; A. De Guttry, Le rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milan, 1985, pp. 283 ff.; M. Spinedi, "Crimes of States: the Legislative History", in J. Weiller, A. Cassese, M. Spinedi (eds) International Crimes of States, Berlin-New York, 1989, pp. 115 ff.; D.N. Hutchinson, "Solidarity and Breaches of Multilateral Treaties", in BYIL, Vol. 61, 1990, pp. 196 ff.; A.L. Sicilianos, Les réactions décentralisées à l'illicite, Paris, 1990, pp. 135 ff.

164/ W. Riphagen, Preliminary Report, cit., paras. 37-42, pp. 114-115 and paras. 62-65, pp. 119-120; A. De Guttry, op.cit., pp. 290-301; K. Sachariew, "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status", in Neth. Int. Law Review, 1988, pp. 272 ff.; D.N. Hutchinson, op.cit., pp. 164-196; L.A. Sicilianos, op.cit., pp. 110-134.

165/ See the doctrine cited in para. 81, note 155, of this Report, especially G. Fitzmaurice, Second Report on the Law of Treaties, YBILC 1957, Vol. II, pp. 34 ff. See also, K. Sachariew and D.N. Hutchinson loc. cit. in the preceding note.

166/ M. Akehurst, "Reprisals by Third States", in BYIL, Vol. 44, 1970, p. 14; O. Schachter, "The Enforcement of Judicial and Arbitral Decisions", AJIL, Vol. 54, 1960, pp. 11-12; W.M. Reisman, Nullity and Revision. The Review and Enforcement of International Judgments and Awards, New Haven and London, 1971, pp. 793 ff.; L.A. Sicilianos, op.cit., pp. 103-107.

necessarily gross or massive, with human rights obligations; 167/ - violation of the freedom of the high seas; 168/ - abuse of natural resources of common interest; 169/ - and other situations. 170/ The Commission has expressly considered such other States hypotheses by covering them in subparagraphs (e) (ii) and (iii) and (f) of paragraph 2 of the cited draft Article 5. According to these provisions injured State means:

> "(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
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> (i) the right has been created or is established in its favour;
>
> (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
>
> (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;
>
> (f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto."

167/ See, inter alios, A. Rougier, "La théorie de l'intervention d'humanité", RGDIP, Vol. 17, 1910, pp. 468 ff.; D. Schindler, "Le principe de non-intervention dans les guerres civiles", in Ann. IDI, Vol. 55, 1973, p. 481; W. Riphagen, Sixth Report on State Responsibility, YBILC, 1985, Vol. II, (Part One), p. 8, Comment to Article 5, para. 22.

168/ G. Tunkin, Droit international public. Problèmes théoriques, Paris, 1965, p. 223; L. Oppenheim, International Law, A Treatise, Vol. I, 8th edition, London, New York, Toronto, 1955, p. 308.

169/ G. Tunkin, op.cit., p. 223; W. Riphagen, Fourth Report on State Responsibility, YBILC, 1983, Vol. II, (Part One), p. 17, para. 90.

170/ The situations of "non-directly" or "less directly" affected States are of course determined, in such instances, by the different degrees of interest of this class of injured States or any ones of them in the compliance with their obligations by others, and mainly by the degrees to which any such interest may be found to be legally protected. References and interesting examples in K. Sachariew, op.cit., especially pp. 278 ff. and L.A. Sicilianos, op.cit., pp. 100 ff. The matter deserves further exploration.

92. Once the States defined as "injured" (though other than the "directly" or "specially affected" States) and thus qualified as parties in the responsibility relationship, the problem arises in determining whether or not the rights and facultés (and possibly duties) arising for them from the wrongful act are subject to the same régime as those of the "directly" or "specially" affected State and, if the answer is in the negative, then to which régime. 171/ The most difficult problem in that respect is precisely to know whether the so-called "indirectly injured" States are entitled to resort to countermeasures and, if so, whether such resort is subject to different, presumably stricter, limitations or conditions than those applying to the measures taken by the "specially affected" State. 172/ The literature which

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171/ This problem has been explicitly brought up in the Commission by Professor Riphagen, in whose view it seems clear "that there is a distinction to be made - for the purpose of determining the legal consequences of a wrongful act - between a State directly affected by a particular breach of an international obligation (the "injured State") and other States, be they parties to the (multilateral) treaty creating the obligation or not. Within a scale of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act" (Preliminary Repo-t, cit., p. 115, para. 42).

172/ Of this kind, for example, is the distinction envisaged (set forth) in Article 60 of the Vienna Convention on the Law of Treaties, where resort to suspension or termination of multilateral treaties is different for the "specially affected" State and for any other participating State. According to that Article:

> "2. A material breach of a multilateral treaty by one of the parties entitles:
>
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State, or international organization, or
>
> (ii) as between all parties;
>
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;
>
> (c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."

is not abundant 173/ on this point appears to be divided. Some authors deny that "not directly injured" States are entitled to resort to measures. 174/ Others, on the contrary, admit the possibility, at least in certain cases. 175/

93. It should be noted, however, that the whole matter we are dealing with in the present Chapter concerns more than just countermeasures. Although the question is neglected by a considerable part of the doctrine, there is also - and, in a sense, firstly - the problem to determine whether the so-called "non-directly" injured States are entitled to claim compliance with the substantive obligations involved in the responsibility relationship. 176/ We refer to cessation, restitution in kind, reparation by equivalent and satisfaction, including guarantees of non-repetition. According to Riphagen, for example, a "non-directly" injured State could "not claim damages ex tunc, since by definition there is no injury to its material interest. But a re-establishment ex nunc (to the direct benefit of the injured State!) and a guarantee ex ante against further breaches may well be in the (non-material) interest of that State". 177/

94. It is thus clear that the problems arising from the degree to which a State may be injured reach beyond the subject-matter of the present report, namely countermeasures. It concerns the substantive consequences as well; and, with even greater complications, it also concerns both the substantive and instrumental consequences of crimes. While postponing momentarily the latter, to be dealt with when the subject of crimes is taken up, we believe that our immediate effort should concentrate on a more thorough analysis of practice and doctrine concerning the position of the so-called "non-directly" injured States. This with a view to the elaboration of an ad hoc section of the part of the project covering the consequences of delicts.

173/ We refer in fact to the literature concerning specifically the consequences of delicts - leaving out for the time being the doctrine concerning crimes, to be considered at a further stage.

174/ K.J. Partsch, "Repressalie", in K. Strupp, H.J. Schlochauer, eds., Wörterbuch des Völkerrechts, III, Berlin, 1962, pp. 103 ff.; B. Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and damages"; in Hague Rec., Vol. 185, 1984-II, p. 86; D.N. Hutchinson, op.cit., p. 170.

175/ L. Oppenheim, Vol. I, op.cit., p. 308; G. Tunkin, op.cit., p. 223; R. Pisillo Mazzeschi, Risoluzione e sospensione dei trattati per inadempimento, Milan, 1984, pp. 216 ff. and 335 ff.; E. Zoller, Peacetime, op.cit., p. 115 ff.; A. De Guttry, op.cit., pp. 295-298.

176/ Interesting reflections on this issue can be found in the cited works by K. Sachariew and D.N. Hutchinson.

177/ Preliminary Report, cit., p. 114, para. 40.

95. In the section thus envisaged we propose to determine, in the light of the practice of States and international tribunals, whether to add to the distinctions among the kinds of injured States set forth in paragraph 2 of draft Article 5 already adopted but not exempt from criticism, 178/ the differences in the legal situation of "specially" affected States on one side, and the so-called "non-directly" affected States, on the other side. One should determine in particular whether the so-called "non-directly" affected States (namely, the injured States envisaged in the provisions of subparagraphs (e) (ii) (iii) and (f) of paragraph 2 of Article 5), should enjoy: - the right to claim cessation, restitution in kind, reparation by equivalent, and/or satisfaction, including guarantees of non-repetition; - the faculté to resort to countermeasures and, if so whether such a faculté is or should be subject to conditions and restrictions identical to or different from those obtaining for the measures available to "specially" affected States; - whether any further distinctions should not be established within the general category of "non-directly" affected States; - or whether, contrary to the hypotheses formulated so far, no real differences exist or should exist with respect to the consequences of the wrongful acts at present in question, based on the different "position" - of "directly" or "indirectly" affected States - as "active parties" in the responsibility relationship. This very distinction would be, in a sense, a false concept due perhaps to some imprecision in the approach to the problem of the determination of the active side of the responsibility relationship. Only after clarifying this point would one be able to decide whether the rights and facultés (and possibly duties) of "non-directly" affected States should be the object of a distinct section or chapter, or whether any differences in the position of the so-called "non-directly" affected States should be covered by appropriate modifications of the draft articles dealing with the position of "directly" affected States. There is, of course, a third possibility: namely that neither distinct articles nor an adaptation of general articles be really required in order to cover the position of "non-directly" affected States. It is possible, in other words, that that position - with regard to both substantive rights and countermeasures - should be left to depend simply on the normal application, to the position of "non-directly" injured States, of the general rules governing the substantive and instrumental consequences of internationally wrongful acts. The latter possibility might be the most likely in view of the fact that the peculiar features of the position of "non-directly" affected States might well be just a matter of degree.

178/ See the critical observations made by K. Sachariew, op.cit., pp. 274-276 and L.A. Sicilianos, op.cit., pp. 116-119.

CHAPTER X

Substantive Limitations Issues

96. The most important, in the area now under review is, of course, the set of problems concerning the means injured States may lawfully deploy - severally or jointly - in the exercise of their faculté of unilateral reaction to an internationally wrongful act. These issues are: (a) the unlawfulness of resort to force; (b) respect for human rights in the widest sense; (c) the inviolability of diplomatic and consular envoys; (d) compliance with imperative rules and erga omnes obligations. The difficulty of these matters imposes separate, however brief, assessments of the main issues they respectively involve.

A. The Prohibition of Force

97. The main proposition offered by the literature - and confirmed by a number of authoritative pronouncements of international political and judicial bodies 179/ - is of course the condemnation of any form of armed reprisals or countermeasures. The prevailing view is more precisely in the sense that such a condemnation is not just a matter of contractual - United Nations Charter -

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179/ Among the main elements upon which the condemnation of armed reprisals is considered to rest (in addition to the comprehensive article 2 (4) of the United Nations Charter and in support of the consolidation of the prohibition into a general rule) one can list inter alia: the ICJ's statement in the Corfu Channel case with respect to the recovering of the mines from the Corfu Channel by the British Navy ('Operation Retail') (ICJ Reports 1949, p. 35, see also YBILC, 1979, II, (Part One) para. 89); Security Council Res. S/3538 of 19 January 1956, Res. S/5111 of 9 April 1962, Res. 188 of 9 April 1964; paragraph 6 of the first principle of the "Friendly Relations" Declaration (Res. 2625 (XXV) of 24 October 1970); Sect. II, (c) of General Assembly Res. 36/103 (9 December 1981) on "Inadmissibility of Intervention and Interference in the Internal Affairs of States"; and the recent ICJ judgement in the Military and Paramilitary Activities in and Against Nicaragua case (ICJ Reports 1986, paras. 248-249, p. 127). The Helsinki Final Act of August, 1975, contains an explicit condemnation of forcible measures as well. Part of Principle II of the Declaration of Principles embodied in the first "Basket" of that Final Act reads: "Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force" (Text in L. Sohn, ed., International Organisation and Integration, II,D,1.a.i., The Hague/Boston/London, 1983, p. 3).

law. Together with the whole content of Article 2, paragraph 4 of the Charter, that prohibition would have become, according to the said prevailing view, a part of general, unwritten international law. 180/

98. According to other views - views determined by some persistent practices - there would be forms of unilateral (individual or collective) resort to force that would have either survived the sweeping prohibition of Article 2, paragraph 4 or resuscitated as a justifiable form of reaction: this under the concepts of forcible or armed reprisals or self-defence. 181/ According to some of the writers more or less decidedly holding the said views "a total outlawry of armed reprisals ... presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any

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180/ In the sense that the prohibition of armed reprisals has acquired the status of a general ("customary") rule, the contemporary doctrine (in conformity with the cited 1986 ICJ judgment) is almost unanimous (I. Brownlie, International Law and the Use of Force by States, Oxford, 1963, pp. 110 ff. and pp. 281-282; P. Reuter, Droit international public, Paris, 1983, pp. 510 ff. and in particular pp. 517-518; A. Cassese, Il diritto internazionale nel mondo contemporaneo, Bologna, 1984, p. 160; H. Thierry, J. Combacau, S. Sur, Ch. Vallée, Droit International Public, Paris, 1986, pp. 192, 493 ff., particularly p. 508; B. Conforti, Diritto internazionale, Napoli, 1987, p. 356; Ch. Dominicé, "Observations sur les droits de l'Etat victime d'un fait internationalement illicite", in Droit international 2, Paris, 1981-1982, p. 62; F. Lattanzi, Garanzie dei diritti dell'uomo nel diritto internazionale generale, Milan, 1983, pp. 273-279; J.C. Venezia, "La notion de représaille en droit international public", in RGDIP, Vol. 64, 1960, pp. 465 ff. p. 494; J. Salmon, "Les circonstances excluant l'illicéité", in Responsabilité internationale, Paris, 1987-1988, p. 186; W. Riphagen, Fourth Report on State Responsibility, YBILC, II, (Part One) 1983, p. 15, para. 81). The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2 (4) of the Charter as reaffirmed in the Friendly Relations Declaration (see, for example, J. Kunz, "Sanctions in International Law", in AJIL, Vol. 54, 1960, pp. 325 ff; G. Morelli, Nozioni di diritto internazionale, Padova, 1967, pp. 352 and 361 ff.; G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", in Hague Rec., Vol. 137, 1972-III, p. 536). It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to "non-armed" or, perhaps less precisely, "non-forcible" reprisals or measures (we refer, in particular, to the cited works by A. De Guttry, and E. Zoller, and to the work by O.Y. Elagab, The Legality of Non-Forcible Countermeasures in International Law, Oxford, 1988). These authors obviously assume that "the prohibition to resort to reprisals involving armed force had acquired the rank status of a rule of general international law" (A. De Guttry, op.cit., p. 11).

181/ R.A. Falk, "The Beirut Raid and the International Law of Retaliation", AJIL, Vol. 63, 1969, pp. 415-443; D.W. Bowett "Reprisals Involving Recourse to Armed Force", in AJIL, Vol. 66, 1972, pp.1-36;

resort to unlawful force which has simply not been achieved". 182/ A further cause for resort to forcible measures would seem to be the fact that during the last decades guerrilla activities have increased enormously. With respect to the law on armed reprisals these activities pose a special problem. 183/ Analysing incidents in the Israeli-Palestinian context brought before the Security Council, one of the cited authors concluded "that the Security Council has never been able to stop the practice of reprisals and may now be moving towards a partial acceptance of 'reasonable' reprisals". 184/ He observed that "if this trend continues, we shall achieve a position which, while reprisals remain illegal de jure, they become accepted de facto". 185/ Another author goes decidedly further when he observes that the use of armed coercion is proven by practice to be indispensable to protect the objectives of the Charter: "[t]here is a need perhaps for some kind of reinstitution of

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R.W. Tucker, "Reprisals and Self-Defense: The Customary Law", AJIL, Vol. 66, 1972, pp. 586-596; R. Lillich, "Forcible Self-Help under International Law", in 62 United States Naval War College - International Studies (1980), Readings in International Law from the Naval War College Review 1947-1977 (R. Lillich and Moore, eds.), Vol. II: The Use of Force, Human Rights and General International Legal Issues; D. Levenfeld, "Israeli Counter Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law", Columbia Journal of Transnational Law, Vol. 21, 1982, p. 148; Y. Dinstein, War, Aggression and Self-Defence, Cambridge 1988, pp. 202 ff. For a critical review of this literature, see R. Barsotti, "Armed Reprisals", in A. Cassese, ed., The Current Legal Regulation of the Use of Force, Dordrecht, Boston, Lancaster, 1986, pp. 81 ff.

182/ D.W. Bowett, in AJIL, Vol. 66, op.cit., p. 2. But similar considerations had been put forward earlier. See, for example, E.S. Colbert, Retaliation in International Law, New York, 1948, and J. Stone, Aggression and World Order. A Critic of United Nations Theories of Aggression, London, 1958, especially pp. 92 ff. Bowett continues "[A]s States have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in doing so, they will not incur anything more than a formal censure from the Security Council" (op.cit., p. 2).

183/ "Guerrilla forces seeking to overthrow established governments often operate from safehavens located in adjoining States ... The State of refuge often pleads lack of competence or knowledge ..., leaving the target State no viable legal recourse beyond measures within its own borders" J.L. Taulbee, J. Anderson, "Reprisal Redux", Case Western Reserve Journal of International Law, Vol. 16, 1984, pp. 309-336, p. 322.

184/ D. Bowett, in AJIL, Vol. 66, 1972, op cit., p. 21.

185/ Ibid., pp. 10-11. The same and other authors stress that these realities of State practice cannot be ignored, especially since the United Nations Security Council on several occasions appeared to condone forcible measures.

reprisal - if not in the most classical sense, then in a more limited sense - as some kind of sanctioning instrument under international law". 186/ As regards the answers - legal or quasi-legal answers - three different lines of thought have been put forward in order to reduce the discrepancy between the law and the actual practice. One author tries to develop a framework of criteria (of reasonableness), compliance with which would result in the non-condemnation of given armed measures. 187/ "The result redefines the right of an individual State to use violence in a manner that minimizes the

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186/ R. Lillich, op.cit., p. 133.

187/ In his article on the Beirut Raid and the international law of retaliation, Falk maintains that it is impossible, or at least unrealistic to hold on to the unqualified prohibition of armed reprisals. He suggests a framework embodying general guidelines or policies for States to restrain their resort to, and the intensity and duration of forcible measures in periods of peace:

"(1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

(2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;

(3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;

(4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;

(5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution is taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;

(6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;

(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;

(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constitutes the unacceptable provocation are clearly conveyed;

devolution from the generally agreed interpretations of Charter norms". 188/ Another writer suggests that one interpret the legal notion of self-defence in a broad sense so as to comprise forcible measures. 189/

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(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign State;

(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;

(11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1) - (10), and that a disposition to accord respect to the will of the international community be evident;

(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises". (R.A. Falk, op.cit., pp.440-442).

188/ J.L. Taulbee, J. Anderson, op.cit., p.325.

189/ In 1972, Tucker argued that the right to have recourse to forcible reprisals formed part of the customary right to self-defence included in the broad interpretation of Article 51: "the substance of the measures forbidden by Article 2, paragraph 4, may, in effect, be permitted under the guise of self-defense by Article 51" (R.W. Tucker, op.cit., pp. 594). "Indeed, so broad is the license afforded by the customary right of self-defense that it is difficult to see what forcible reprisals added of significance to the State's right to use force in self-help that was not already implicit in self-defense" (ibid., p. 593). "[W]hile there is a difference in the conditions held to govern the exercise of forcible reprisals and self-defense [in case of forcible reprisals a State must first have sought to obtain redress for the alleged injury by peaceful means, p. 590] even this difference appears quite modest when applied to provocative unlawful behavior occuring within the context of a generally antagonistic relationship between States" (ibid., p. 593). Also Dinstein recently tried to justify certain kinds of armed reprisals (namely those against acts of terrorism) extending the scope of the exception of self-defence as provided for in Article 51 of the Charter. In particular, this author distinguishes between "offensive reprisals" which would fall under the prohibition of Article 2 (4) and "defensive reprisals" which would instead be exempted from this prohibition by virtue of Article 51 (op.cit., pp. 202 ff.).

Another one seems to attempt a combination of both methods while stressing the need for effective international fact-finding missions. 190/.

99. The practice of States which has prompted the said literature - a practice, to be sure, not so abundant and geographically limited - raises indeed questions. The main question is whether the absolute condemnation of force contained in Article 2, paragraph 4 applies even in cases of wrongful acts involving force but not qualifying as armed attacks (aggression) and thus not justifying self-defence as strictly defined, or whether any exceptions to the said strict rule are admissible or tolerable: and if so, in what circumstances and under what legal conditions. Examples would presumably be, according to the aforementioned doctrines, armed reaction to forms of indirect aggression and terrorism. It should not be overlooked, however, that the problem of lawfulness arises also in connection with forcible reprisals resorted to by way of reaction to wrongful acts not involving armed force although particularly serious. We refer to cases of resort to force by way of

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190/ Although he also thought that the discrepancy between the law and actual practice would be reduced if "the Council took a broader view of self-defense", Bowett still held, contrary to Tucker, armed reprisals to be prohibited in international law (D.W. Bowett, in AJIL, Vol. 66, 1972, op.cit., p. 22). "The clear position is that the Council, as a matter of principle, condemns armed reprisals as illegal. The unclear position emerges from the Council's failure to condemn in certain circumstances" (ibid.). "The principle as part of the broader prohibition of the use of force, is jus cogens, and no spasmodic, inconsistent practice of one organ of the United Nations could change a norm of this character" (ibid., pp. 21-22) (emphasis added). "This is the more so, because ... in the context of the General Assembly's adoption of the 'Declaration on Principles of International Law', etc., in October, 1970, the reiteration of the formal principle of the illegality of armed reprisals was quite categorical" (ibid., emphasis added). Nonetheless, since States sometimes ignore this prohibition, and because one has to guard for a serious degeneration of the law, Bowett proposes a three-fold approach to the problem of restraining resort to forcible reprisals. He firstly endorses, with some qualification, Professor Falk's framework as "guides to moderation by decision makers .... so as to contain reprisals within limits of reasonableness" (ibid., p. 32). Secondly, he proposes: "the establishment of appropriate and effective machinery for fact-finding and intermediate review by impartial agencies, with authority derived from competent international organs rather than the parties" (ibid., emphasis added). Bowett's last suggestion for the restraint of resort to forcible reprisals is the "application of constraint in the form of sanctions by competent organs of final review such as the Security Council or, exceptionally, an appropriate regional body, designed to ensure compliance with authoritative censure of any policy of reprisals or illegal activities likely to give rise to reprisals" (ibid., emphasis added).

reaction to "economic aggression", to violations of self-determination, 191/ or in order to safeguard the lives of nationals in a foreign State or in pursuit of other, non-national, humanitarian purposes. 192/

100. While reserving any conclusion with regard to resort to force by way of reaction to wrongful acts qualified as crimes of States under draft Article 19, no definite conclusions can be reached with regard to the applicability of the doctrines in question to countermeasures against ordinary wrongful acts. We are only able to anticipate, subject to more accurate analysis, our inclination to believe that the said doctrine should have no place, even de jure condito, within the framework of the consequences of international delicts. We are unable to envisage any possibility for the Commission to admit any derogation from the prohibition of armed reprisals as implied in Article 2, paragraph 4 of the Charter and emphasized in the relevant part of Resolution 2625 (XXV). Like others we are not convinced by arguments on the necessity of altering current prohibitions in order to adapt them to the realities of State practice. 193/

101. Another problem which has been raised in the doctrine and practice concerning the condemnation of force, is the possible impact of that prohibition on the lawfulness of economic coercion (or certain kinds thereof) as a form of countermeasure. According to the most widely accepted

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191/ On these issues see the recent study by L.A. Sicilianos, op.cit., pp. 389-395, 427-455.

192/ See, inter alios, N. Ronzitti, Il ricorso alla forza armata a protezione dei cittadini all'estero e per ragioni d'umanità, Pisa, 1980; and D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in A. Cassese, ed., The Current Legal Regulation, op.cit., pp. 39-55.

193/ To put it with Taulbee and Anderson, "(t)hose arguments rest upon events and situations that are transitory or which are not amenable to control through legal means" (J.L. Taulbee, J. Anderson, op.cit., p. 333). The said arguments are indeed furthermore unconvincing because "the idea that the law should authorize what it cannot constrain is especially pernicious". "[T]he prudent course is to tolerate certain practices when necessity demands rather than investing them with the sanctity of a legal rule. The seeming disorder of contemporary life should not diminish the view of the Charter" (ibid., p. 333-334). Similarly, Barsotti observes that "from a quantitative point of view (that is, judging from the frequency of relevant actions) the divergence between the prohibition of armed reprisals, embodied in the Charter, and actual practice, is not so serious as to give grounds to the belief that there is a process of degeneration of the ban in question" (op.cit., p. 90).

interpretation of the prohibition of force, notably of paragraph 4 of Article 2 of the United Nations Charter (and any "equivalent" rule of general international law), the term "force" means military force only. Any objectionable forms of economic coercion could only be condemned - as some of them are expressly condemned in international instruments other than the Charter - as a part of the distinct rule prohibiting intervention or given forms thereof. 194/ In particular, economic coercive measures would be prohibited - by the Charter of the Organization of American States, the Friendly Relations Declaration and other instruments including principle VI of the Helsinki Final Act - whenever they were resorted to against a State "in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it adavantages of any kind". 195/

102. The opposite argument according to which Article 2, paragraph 4 of the Charter would prohibit not only armed reprisals but also economic coercion has been initially affirmed in official statements and doctrinal contributions

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194/ Cfr. H. Waldock, "The Regulation of the Use of Force by Individual States in International Law", Hague Rec., Vol. 81, 1952-II, pp. 493-4; L. Oppenheim, op.cit., Vol. II., p. 153; D.W. Bowett, "Economic Coercion and Reprisals by States", Virg. JIL, Vol. 13, 1972, p. 1; R. Lillich, "The Status of Economic Coercion Under International Law: United Nations Norms", R. Mersky ed., Conference on Transnational Economic Boycotts and Coercion, 19-20 February 1976, University of Texas Law School, Vol. I., pp. 116-17; A. Beirlaen, "Economic Coercion and Justifying Circumstances", RBDI, Vol. 18, 1984-5, p. 67; M. Virally, "Commentaire de l'article 2 par. 4 de la Charte", in J.P. Cot, A. Pellet, eds., La Charte des Nations Unies, Paris-Bruxelles, 1985, pp. 120-21; C., Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", in AFDI, Vol. 28, 1982, pp. 63-69; P. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the ILC's Draft Articles on State Responsibility", in ZaöRV, Vol. 43, 1983, p. 737; O.Y. Elagab, op.cit., p. 201; I. Seidl-Hohenveldern, "International Economic Law", Hague Rec., Vol. 198, 1986-III, pp. 200-1, American Law Institute, Restatement of Law Third, St. Paul (Minn.), 1987, p. 383; L.A. Sicilianos, op.cit., pp. 248-253.

195/ For this interpretation: D.W. Bowett, op.cit., in Virg. JIL, Vol. 13, 1972, pp. 2-3; Y. Blum, "Economic Boycotts in International Law", Conference on Transnational Economic Boycotts, op.cit., p. 96; P. Malanczuk, op.cit., p. 737; A. Beirlaen, op.cit., p. 67; I. Seidl-Hohenveldern, "The United Nations Economic Coercion", in RBDI, vol. 18, 1984-5, p. 11; and J. Salmon, op.cit., p. 186. On this point see also, L. Boisson de Chazournes, Les contre-mesures dans les relations internationales économiques, Thèse présentée à l'Université de Genève, 1990, Chapter III, Part A, Section 3, para. 3.2, pp. 149-151.

from developing and socialist countries. 196/ But, following the Arab oil embargo of 1973, even some Western authors supported this position. 197/ According to a different opinion, based inter alia on the absence in the Charter of any provision condemning individual coercive measures other than Article 2, paragraph 4, it would be more correct to think that whenever a measure of economic coercion assumed such features and dimensions as to determine consequences amounting to a "strangulation" of the target State, the form of violence they imply does not differ in aim or result from the exercise of a resort to armed force. One should admit, in the presence of such a possibility, that "the term force means more than just armed force". Indeed, the prohibition contained in Article 2, paragraph 4 should be logically understood to "embrace also measures of economic or political pressure applied either to such extent and with such intensity as to be an equivalent of an armed aggression or, in any case - failing such an extreme - in order to force the will of the victim State and secure undue advantages" for the acting State. 198/ This variety of opinions imposes an accurate investigation of the practice of States in order to determine whether resort to certain kinds of economic measures against a wrongdoing State may constitute under given extreme conditions an unlawful resort to force. Were such to prove to be the case, one should further determine whether such a practice would be condemned under the same (written and unwritten) rule prohibiting armed force or under the rule condemning given forms of intervention.

B. Respect for Human Rights and Other Humanitarian Values

103. The necessity of setting to reprisals limitations dictated by "supreme exigencies of civilization and humanity" seems to have mainly manifested itself, at the outset, in the regulation of belligerent reprisals. It was indeed principally in time of war that those exigencies came in fact more frequently to be sacrificed. However, the belief in the existence of inviolable ethical limits to the exercise of reprisals led early to the recognition that the limitations of reprisals in wartime should apply

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196/ We refer, inter alia, to the position of J. Zourek, "La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?", in Mélanges Rolin, Paris, 1964, pp. 530 ff.; and M. Obradovic, "Prohibition of the Threat or Use of Force", in M. Sahovic, ed., Principles of International Law Concerning Friendly Relations and Cooperation, Belgrade, New York, 1972, pp. 76 ff.

197/ J.J. Paust, A.P. Blaustein, "The Arab Oil Weapon - A Threat to International Peace", in AJIL, Vol. 68, 1974, pp. 420 ff.

198/ G. Arangio-Ruiz, "Human Rights and Non-Intervention in the Helsinki Final Act", in Hague Rec., Vol. 157, 1977-IV, p. 267. A similar position is taken by A. Cassese, Diritto internazionale, op.cit., p. 163.

a fortiori in time of peace. 199/ A case in point is once more the doctrine which was applied in Naulilaa, according to which for a reprisal to be lawful it must be "limitée par les exigences de l'humanité et les règles de la bonne foi applicables dans les rapports d'Etat à Etat". 200/

104. The "supreme exigencies" in question (as applying in peacetime) affected in the first place the limits within which reprisals could not unlawfully cause injury to foreign nationals. Whatever the seriousness of the violation involved, the injured State's measures could not be such as to tread upon certain fundamental principles of humanity to the detriment of the offending State's nationals in the injured State's territory: by violating, for example, their right to life, their right not to be subjected to physical or moral violence, notably to torture, slavery or any other indignity. 201/

105. Beside the exigency of the protection of foreign nationals, the importance of the respect for fundamental humanitarian principles in general was equally stressed early. For example, in the course of the League of Nations Assembly's debates on the implementation and amendment of Article 16 of the Covenant with regard to the economic measures to be applied in case of aggression, the necessity was repeatedly voiced not to endanger in any case humanitarian relations. 202/ The 1934 Resolution of the International Law Institute states in paragraph 4 of Article 6 that in the exercise of reprisals a State must "s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique". 203/

199/ See F. Lattanzi, Garanzie, op.cit., pp. 293-302; similarly A. De Guttry, op.cit., pp. 268-271. After explaining that resort to one or the other of the possible coercive measures depends on the choice of States, Anzilotti noted that States are not absolutely free in their choice: and after listing a number of actions which were condemned by the laws of warfare although they constitute a minus as compared to warfare itself, concluded that a fortiori they were to be condemned in peacetime (Corso di diritto internazionale pubblico, v. III, Rome, 1915, pp. 166-67).

200/ Unriaa, II, p. 1026.

201/ As early as 1888, for example, following the violation by the United States of the 1880 treaty on the establishment of Chinese nationals (the "Chinese exclusion Act"), China, while suspending performance of its treaty obligations towards the United States, decided nevertheless to respect, for reasons of humanity, the rights of United States nationals under Chinese jurisdiction (Foreign Relations of the United States 1889, p. 132). Recently, in its comment to Article 905 the cited Third Restatement of the Law affirms that "Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and the treatment of foreign nationals" (Restatement, op.cit., p. 381).

202/ League of Nations, Reports and Resolutions on the Subject of Article 16 of the Covenant, 13 June 1927, p. 11 ff.

203/ Ann. IDI, Vol. 38, 1934, p. 709.

106. The impact of the general principles in question has been strengthened and specified thanks to the relatively recent development of that substantial corpus of rules which constitute the contemporary law of human rights. Letting aside the question whether and to what extent the treaty rules in the field of human rights have become or are close to becoming a part of general international law, it cannot be doubted that this development brings about a further restriction of the liberty of States to resort to forms of reprisals susceptible of imperilling the human interests for the protection of which that development has taken place. 204/

107. Explicit indications to that effect are contained in provisions of international instruments on human rights. Article 4 of the 1966 United Nations Covenant on Civil and Political Rights provides that States "may take measures derogating from their obligations under the present Covenant" only "in time of public emergency which threatens the life of the nation": and even under circumstances of that kind States are not to take measures derogating from some fundamental principles of humanity. It has been inferred that the rights contemplated in the Covenant cannot be infringed by measures taken by way of reaction to an internationally wrongful act. 205/ Of relevance is also paragraph 5 of Article 60 of the Vienna Convention on the Law of Treaties (adopted by 87 votes in favour, 9 abstensions and no opposition) according to which suspension or termination - partial or total - of a treaty in case of a material violation shall in no case be resorted to with regard "to provisions relating to the protection of the human person contained in treaties of a humanitarian character". 206/ Schachter is of the

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204/ In this sense, inter alios, G. Morelli, Nozioni, op.cit., p. 362; P. Reuter, op.cit., p. 463; W. Riphagen, Fourth Report, op.cit., p. 17, paras. 88-89; Ch. Dominicé, op.cit., p. 62; E. Zoller, "Quelques réflexions sur les contre-mesures en droit international public", in Etudes Colliard, Paris, 1984, p. 376; O. Schachter, "Self-Help in International Law: US Action in the Iranian Hostages Crisis", in Journal of International Affairs, Vol. 37, 1983-1984, pp. 231-233.

205/ A. De Guttry, op.cit., p. 271.

206/ On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see F. Lattanzi, Garanzie, op.cit., pp. 302 ff.; L.A. Sicilianos, op.cit., pp. 352-358. On the same line draft Article 11 of Part Two of the project as proposed by our predecessor states that "[t]he injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that: (c) such obligations are stipulated for the protection of individual persons irrespective of their nationality" (W. Riphagen, Sixth Report on State Responsibility, YBILC, Vol. II, (Part One) p. 12).

opinion that "treaties covered by this paragraph clearly include the Geneva Convention for the protection of victims of war, the various human rights treaties, and conventions on the status of refugees, genocide and slavery". 207/

108. It remains, of course, to be seen to what extent rules such as those in which no explicit mention is made of measures of reaction to an internationally wrongful act condition the choices of injured States with regard to measures under general international law. The question can notably be raised whether and to what extent limitations of the said choices could also derive from the United Nations Covenant on Economic, Social and Cultural Rights.

109. The rules evoked in the preceding paragraphs are interpreted quite extensively by some authors. They affirm, for example, that limitations can not only be derived from treaties and general rules on human rights (or from the humanitarian law of armed conflicts) but from any rules intended in any way to safeguard the moral and material interests of human beings. An injured State could thus not react by terminating (or even suspending) a treaty providing forms of economic assistance to the offending State with a view to improving the conditions of a part of the latter's population. 208/ This should safeguard, for example, the obligations of injured States in the area of international cooperation to development as envisaged within the framework of the New International Economic Order. 209/ But an opposite view is taken by others, for example by Conforti. 210/

207/ O. Schachter, "International Law in Theory and Practice. General Course in Public International Law", Hague Rec., Vol. 178, 1982-V, p. 181. The inviolability of these rules (by way of reprisal) is also maintained by K. Zemanek, "Responsibility of States: General Principles", in Enc. of Publ. Int. Law, Vol. 10, 1987, p. 371.

208/ A. Cassese, Il Diritto Internazionale, op.cit., p. 271. In the same sense, L. Boisson de Chazournes, op.cit., Chapter III, Part A, Section 3, para. 3.3, p. 153.

209/ Similarly, O.Y. Elagab, op.cit., p. 194, is of the opinion that cases of economic coercion of particular severity should be identified, for instance, by applying the "factor of dependence and reliance": - that is, by examining whether and to what extent measures have as their object commodities or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in case of measures directed against developing countries.

210/ B. Conforti, op.cit., p. 360.

110. The difficulty in setting the threshold beyond which countermeasures are or should be condemned for the infringement of humanitarian obligations in a broad sense lies in the precise determination of the human rights and interests the violation of which would not be permitted even in the exercise of a reaction to a State's unlawful act. Surely not any human right or interest could reasonably so qualify.

111. An obvious instance is the question whether the faculté of reprisals finds any limitation in the rules protecting the property of nationals abroad and particularly the assets of business companies. Different trends can be identified in the literature. According to one of these, reprisals against the private property of nationals of the offending State would be unlawful in that ownership would qualify as an element of the wider category of human rights covered by the rules considered in the preceding paragraphs. 211/ Other writers believe that one should apply to this matter a fortiori - in peacetime - the jus in bello prohibition of the taking of private property: "The taking by a State of the property of foreigners in the pursuit even of actual hostilities against their home-country is not justified under general international law. It will therefore be justified even less as a mere measure of reprisal". 212/ Schachter believes, however, that this opinion is not confirmed by the prevailing practice: "Blocking and confiscation of private property of nationals of an enemy State have been common in time of war and generally condoned as wartime measures. However, the seizure of private property as countermeasure against an offending State in time of peace has been characterized as illegal by some jurists but nonetheless carried out by States in recent years". 213/

112. Some commentators of the practice of measures involving private foreign property propose a distincion between final or definitive taking of property, on one side, and temporary measures such as seizure, blocking, freezing et similia, on the other side. The former are generally considered to be

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211/ R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", in Hague Rec., Vol. 176, 1982-II, p. 355.

212/ I. Seidl-Hohenveldern, "Reprisals and the Taking of Private Property", in De Conflictu Legum, Leyden, 1952, p. 475. See also the other authors quoted by A. De Guttry, op.cit., p. 277, note 121.

213/ O. Schachter, "International Law", op.cit., p. 181; see also, E. Borchard, "Reprisals on Private Property", AJIL, Vol. 30, 1936, pp. 108-113. The admissibility of violations of property rights as a form of countermeasure is recently maintained also by L. Boisson de Chazournes (op.cit., Chapter III, Part A, Section 3, para. 3.3, p. 156), who underlines, however, the necessity of the "respect du principe du réglement pacifique de différends et [du] respect de la condition de la proportionnalité".

unlawful while the latter would not be condemnable. 214/ Schachter derives the inadmissibility of the first kind of measures from reasonableness rather than an incompatibility with the raison d'être of reprisals. It would notably be on the basis of reasonableness that the reacting injured State should observe a relative restraint. 215/ According to De Guttry there would be a growing feeling that it is unjust to sacrifice the private property of persons who normally have no part whatsoever in the offending States' wrongful conduct: and this would be gradually leading - albeit not without contradictions - to confine this kind of reprisals only to extreme cases. 216/ More than half a century ago, the International Law Institute expressed itself in the same sense, when it suggested to: "limiter les effets des représailles à l'Etat contre qui elles sont dirigées, en respectant, dans toute la mesure du possible, tant les droits des particuliers que ceux des Etats tiers". 217/

113. Although the most obvious issue is that of the extent to which the exercise of countermeasures should meet an obstacle in the right of private property, more thought should be given to other areas of humanitarian interests where similar problems arise. Examples are the property of cultural institutions, works of art, pharmaceutical industries and public health facilities.

C. Inviolability of Specially Protected Persons

114. It is a widespread doctrinal notion that acts of reprisal would be unlawful if taken in violation of international obligations aimed at the protection of diplomatic envoys and heads of State. Oppenheim states that: "Individuals enjoying the privilege of extra-territoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of

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214/ Among recent commentators, this is the view taken, for example, by E. Zoller, Peacetime, op.cit., pp. 73-74; O.Y. Elagab, op.cit., p. 11; and P. Malanczuk, in M. Spinedi, B. Simma, eds., op.cit., p. 225, on the ground of the irreversible nature of definitive taking and the reversible nature of the temporary measures.

215/ O. Schachter, "International Law", op.cit., p. 182.

216/ A. De Guttry, op.cit., p. 280. Similarly, L.A. Sicilianos, op.cit., p. 360.

217/ Art. 6, para. 3 of the Resolution concerning "le régime des représailles en temps de paix", Ann. IDI, Vol. 38, 1934, p. 709.

reprisals, although this has occasionally been done in practice". 218/ Only a few authors, it seems, question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys. 219/

115. Some of the writers who discuss the raison d'être of the limitation in question seem to believe that it derives from the primary - and peremptory - rules concerning the protection of diplomatic envoys. 220/ Other writers argue the matter on the ground of the "self-contained" or otherwise particular nature of the law of diplomatic relations. 221/ Among these is our distinguished predecessor, according to whom the limitation in question would be a case: "which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather

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218/ L. Oppenheim, International Law, Vol. II, 7th edition, op.cit., p. 140. This opinion was expressed by Hugo Grotius, De Jure Belli Ac Pacis Libri II, The Classics of International Law, J.B. Scott ed., Washington, 1925, Chapter 18, S.iii, S.viii. According to Twiss, diplomatic agents "cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (legati), for they have entrusted themselves and their property in good faith to its protection (T. Twiss, The Law of Nations considered as Independent Political Communities, London and Oxford, 1863, p. 39). See also Ph. Cahier, Le droit diplomatique contemporain, Genève, 1962, p. 22; Ch. Tomuschat, "Zu einige Aspekten ihrer innerstaatlichen Durchfürung", ZaöRV, Vol. 33, 1973, p. 179 ff, p. 187; and Ch. Dominicé, "Représailles et droit diplomatique", in Recht als Prozess und Gefüge. Festschrift für Hans Huber zum 80 Geburtstag, Bern, 1981, p. 547.

219/ D. Anzilotti, op.cit., vol. III, p. 167. See also, recently, B. Conforti, op.cit., pp. 360-1.

220/ According to Röling, who recalls the ICJ judgement in the Hostages Case, "it would have been a good thing if the Court had had or taken the opportunity to make clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that 'reprisals in kind' are also inadmissible. It is possible to dispute the wisdom of this legal situation, but the arguments in favour of the current law - total immunity of diplomats because of the great importance attached to unhindered international communication - prevail".
(B.V.A. Röling, "Aspects of the Case concerning U.S. diplomats and Consular Staff in Teheran", in Neth. YBIL 1980, p. 147). The same opinion is held by Dominicé, who wonders: "Que deviendraient les relations diplomatiques, en effet, si l'Etat qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquester un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?" (Ch. Dominicé, "Observations", op.cit., p. 63).

221/ F. Lattanzi, Garanzie, op.cit., pp. 317-318; O.Y. Elagab, op.cit., pp. 116 ff.

within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established". 222/

116. A more articulate position is taken by others. One of these, for example, asks himself which obligations, among those intended for the protection of diplomatic envoys, would be inviolable by way of reprisals. According to this writer international practice indicates that not all the forms of reprisal against diplomats are considered unlawful. It would be difficult, for example, so to qualify measures enacted in order to restrict the freedom of movement of diplomatic envoys. 223/ It would be consequently possible, according to the cited author, to affirm that the unlawfulness of reprisals against diplomatic envoys covers essentially measures directed against the physical persons of diplomats, such measures consisting, essentially but not exclusively, in a breach of the rule of personal inviolability. The raison d' être of the restriction would reside of course in the necessity to safeguard, in any circumstances, the special protection which is reserved to diplomatic envoys in view of the particular tasks they perform. 224/

117. An adequate analysis of the practice should allow us - and the Commission - to espouse the most appropriate solution, de lege lata as well as from the viewpoint of progressive development. Here as elsewhere it should be considered that any restrictions inevitably reduce the possibility of reaction in even more sensitive areas than that of diplomatic relations. We think of areas of more general humanitarian interest: including vital economic relations.

222/ W. Riphagen, Fourth Report, op.cit., para 91, p. 17. It has to be recalled that Riphagen's draft Article 12 (a) providing that reprisals and reciprocity measures do not apply "to the suspension of the performance of the obligations ... of the receiving State regarding the immunities to be accorded to diplomatic and consular mission and staff", met with some reservations among the members of the Commission (Reuter, in YBILC, 1984, Vol. I, 1858th Meeting, para. 30; Sinclair, ibid., para. 27 and 1856th Meeting, para. 9; Arangio-Ruiz, in YBILC, 1985, Vol. I, 1900th Meeting, para. 21) and representatives in the Sixth Committee (Qatar, in Doc. A/C.6/40, SR.23, para. 106; Czechoslovakia, ibid., SR.29, para. 18; United Kingdom, ibid., SR.32, para. 26).

223/ A. De Guttry, op.cit., p. 282.

224/ Ibid., p. 283. In an analogous way, L.A. Sicilianos, op.cit., p. 351, according to whom "il y a certainement un noyau irréductible du droit diplomatique ayant un charactère impératif - l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives - qui est de ce fait réfractaire aux contre-mesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contre-mesures proportionnées".

D. The Relevance of Jus Cogens and Erga Omnes Obligations

118. In addition to the absolute limits considered so far (as deriving from specific rules or principles of general international law), it must be considered that reprisals may be subject to further limitations. In particular, we refer to such restrictions as may derive from jus cogens. 225/

119. Limitations to the right of reprisal deriving from jus cogens are generally not mentioned in the literature preceding the Second World War. To jus cogens as a general limitation refer instead recently Reuter, 226/ Riphagen, 227/ Zemanek, 228/ Lattanzi, 229/ Gaja, 230/ Alland, 231/ Elagab, 232/ and Sicilianos. 233/ Although jus cogens has originally been considered (in the Vienna Convention on the Law of Treaties) in connection with the inadmissibility of conventional derogation from fundamental general rules, "[i]t would be illogical .... at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation. The same applies when the previous violation also concerns an obligation imposed by a peremptory norm; the very existence of such a category of norms implies that there is a general interest in international society that they should be respected". 234/

225/ On these problems, see F. Lattanzi, op.cit., p. 306.

226/ P. Reuter, op.cit., p. 463.

227/ Riphagen covered the point under his draft Article 12 (b) according to which countermeasures and "reciprocity" measures would not be applied with respect to the obligations incumbent upon a State "by virtue of a peremptory norm of general international law".

228/ K. Zemanek, "La responsabilité des Etats pour faits internationalement illicites ainsi que pour faits internationalement licites", in Responsabilité internationale, Paris, 1987-1988, p. 84.

229/ F. Lattanzi, op.cit., pp. 306 ff.

230/ G. Gaja, "Jus cogens beyond the Vienna Convention", Hague Rec., Vol. 172, 1981-III, p. 297.

231/ D. Alland, op.cit., p. 185.

232/ O.Y. Elagab, op.cit., p. 99.

233/ L.A. Sicilianos, op.cit., pp. 340-344.

234/ G. Gaja, op.cit., p. 297.

120. Indeed, a part of the doctrine laments the absence, in the text of draft Article 30 of Part One of the Articles on State Responsibility, of a clear reference to contrast with jus cogens rules as an exception to the exclusion of unlawfulness of measures taken by way of reaction to an internationally wrongful act. We agree, however, with Gaja's notation that such an exception is implied in draft Article 30's expression "measure legitimate under international law". 235/ By its implied reference to the régime of reprisals that phrase would exclude the lawfulness of measures involving a violation of a peremptory rule. This interpretation is also supported by the express inclusion of the restriction in Professor Riphagen's draft Article 12 (b).

121. The limitation presently under discussion is extended by Lattanzi (from jus cogens rules) to any rule creating erga omnes rights and obligations. According to that writer: "There can be no doubt that the lawfulness of a reprisal consisting in a violation of erga omnes rules is excluded precisely by the fact that the violation of an obligation to the detriment of one State represents simultaneously in such a case a violation of the same obligation to the detriment of all the addressees of the rule. One could not admit that the sanction exercised against one State may consist in the violation of an obligation towards another State". 236/ Erga omnes rules are so structured - according to the cited author - that on the one hand any State party can claim compliance, on the other hand no State party may lawfully react to their infringement by another infringement. 237/ The same point is made by Gaja when he states: "One of the cases in which international law cannot allow countermeasures -.....- is when the obligation which is violated operates in specific cases towards other States: the rights of innocent States would then be necessarily infringed". 238/

122. It will not be overlooked that a largely similar problem (to that of erga omnes obligations) has already been touched upon with regard to suspension and termination of treaties. 239/ In formulating the draft Articles it will therefore be necessary to give careful thought, always in the light of the practice, to the question whether the absolute limitations traditionally recognized with regard to the admissibility of countermeasures (force, human rights, diplomatic envoys) should not be completed by the further condemnation not only of countermeasures taken in contravention to jus cogens rules, but also of measures infringing rules setting forth erga omnes obligations.

235/ Ibid.

236/ F. Lattanzi, op.cit., p. 314 (our translation).

237/ Ibid.

238/ G. Gaja, op.cit., p. 297.

239/ See paras. 81-83, supra.